

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

DAVID BONENBERGER, )  
)  
Plaintiff, )  
)  
v. ) No. 4:12-CV-21-CDP  
)  
THE ST. LOUIS METROPOLITAN POLICE )  
DEPARTMENT, et al., )  
)  
Defendants. )

JURY TRIAL

VOLUME 3

BEFORE THE HONORABLE CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE

AUGUST 21, 2013

**APPEARANCES:**

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1 (Proceedings began at 8:34 a.m.)

2 (The following proceedings were held outside the hearing  
3 and presence of the Jury.)

4 THE COURT: All right. Good morning. First, there  
5 was an issue with the exhibits, and I guess the Plaintiff  
6 wants to include exhibits that were actually marked as  
7 Defendants' Exhibits and are going in for Defendant, is that  
8 right?

9 MS. PETRUSKA: Yes, Your Honor. We believe we used  
10 our exhibits. We're not a hundred percent sure, but we  
11 thought that's what we used when we were presenting them to  
12 the Jury.

13 THE COURT: Okay. And these are numbers -- the ones  
14 we're talking about are 36, 47, 39, and 19?

15 MS. PETRUSKA: I believe. Where's the list?

16 THE COURT: Okay. I show that you did with 36 and  
17 that I received it into evidence. 47, the same. 19, I don't  
18 know for sure. And 39, I don't know for sure. Is there an  
19 objection to our sending them in twice?

20 MS. TUCKER: I'm sorry, Your Honor?

21 THE COURT: Do you object to my sending them in even  
22 if you used them? I mean if they're the same document.

23 MS. TUCKER: If it's the same document, no, Your  
24 Honor, I don't really object.

25 THE COURT: Okay. So even if they haven't been

1 previously received, I'll receive Exhibits 36, 47, 39, and 19,  
2 and they can go to the Jury even though they're duplicates of  
3 what the Defendant's got.

4 Joe, would you hand these down?

5 And then any other discussion about the exhibits that  
6 we need to take up? We talked about whether there were any  
7 that you did not use. For instance, I'm looking at this list,  
8 and I see #12, I'm not sure; #23 or 25, #30, I'm not sure  
9 about. So there were several. Do you have a list?

10 MS. PETRUSKA: Yes, Judge, and we -- we reviewed all  
11 of that several times yesterday, and we would agree that some  
12 of the things that we marked as "will use" were not used or  
13 that were agreed to on stipulations were not used.

14 THE COURT: And so are you going to withdraw them?

15 MS. PETRUSKA: That is correct, Your Honor.

16 THE COURT: Okay. So will you give me the list? And  
17 you all have worked this out, I take it?

18 MS. TUCKER: Yes, Your Honor.

19 THE COURT: Okay.

20 MS. PETRUSKA: Yes. It would be 12, 14, 23, 25, 30,  
21 32, 33, 38, 48, and 49.

22 THE COURT: All right. The exhibits just listed then  
23 are withdrawn and are no longer in evidence in the case and  
24 will not be sent to the Jury. Okay. Thank you.

25 MS. PETRUSKA: Thank you, Your Honor.

1 (See previously filed Excerpt of Jury Instruction  
2 Conference, Document #112.)

3 MS. PETRUSKA: Judge, could I ask a question before  
4 you go in? My intention would be I want to argue from the  
5 podium, but I do want to use some exhibits. Can Ms. Barth put  
6 the exhibits on?

7 THE COURT: Sure, sure.

8 MS. PETRUSKA: Great. That's all I wanted to check.

9 MS. BARTH: I have one additional thing before we --  
10 we have to clean up the record with that deposition. Do you  
11 want me to submit it on the record? We have an agreed  
12 testimony.

13 THE COURT: No. If you'll just give it to me in  
14 writing, I'll endorse it and it'll be put in the file.

15 MS. BARTH: Okay.

16 THE COURT: I'll sign it, and that way it will be  
17 clear.

18 (Court recessed from 10:28 a.m. until 10:34 a.m.)

19 (The following proceedings were held outside the hearing  
20 and presence of the Jury.)

21 THE COURT: Okay. Are you all ready for your  
22 arguments? You've given Carol your warning times and all of  
23 that?

24 MS. PETRUSKA: Yes, Your Honor.

25 THE COURT: And then do any of you object to my

1 reading the first 16 of these instructions before the  
2 arguments?

3 MS. TUCKER: No, Your Honor, I have no problem.

4 MS. PETRUSKA: I'd prefer it because I am going to  
5 use some in the argument.

6 THE COURT: Yeah, and then after the arguments, I'll  
7 read Instruction #17 and the verdict form, but you can use the  
8 verdict form if you want to in the -- in the arguments. I  
9 just won't have read it to them yet.

10 MS. PETRUSKA: Okay. Thank you.

11 MS. TUCKER: Thank you.

12 THE COURT: Okay. All right. Do you want to go get  
13 the Jury?

14 (The following proceedings were held within the hearing  
15 and presence of the Jury.)

16 THE COURT: Good morning, members of the Jury. We're  
17 again in session, and I apologize for the lateness. Sometimes  
18 the law takes longer than we think it would. As I told you  
19 yesterday, what -- what we're going to do this morning is hear  
20 the closing arguments of the lawyers, and as I told you  
21 before, the closing arguments of the lawyers are not evidence.  
22 They're simply your -- their arguments to you about how they  
23 believe you should view the evidence. The law that applies to  
24 the case is set forth in instructions, and I'm going to read  
25 most of those to you now. I'll give you an additional

1 instruction after the arguments. These -- all right.

2 So, members of the Jury, the instructions I gave at  
3 the beginning of the trial and during the trial are still in  
4 effect, and now I'm going to give you some additional  
5 instructions. You have to follow all of my instructions, the  
6 ones I gave you earlier as well as those I give you now. Do  
7 not single out some instructions and ignore others because  
8 they are all important. This is true even though I'm not  
9 going to repeat some of the instructions I gave you at the  
10 beginning of trial. You will have copies of the instructions  
11 I am about to give you now in the jury room. This does not  
12 mean that some instructions are more important than others.  
13 Remember, you have to follow all the instructions, no matter  
14 when I give them, whether or not you have written copies.

15 I have not intended to suggest what I think your  
16 verdict should be by any of my rulings or comments during the  
17 trial.

18 In deciding what the facts are, you may have to  
19 decide what testimony you believe and what testimony you do  
20 not believe. You may believe all of what a witness said or  
21 only part of it or none of it. You may consider the witness'  
22 intelligence, the opportunity the witness had to see or hear  
23 the things testified about, the witness' memory, knowledge,  
24 education, and experience, any reasons a witness might have  
25 for testifying a certain way, how a witness acted while

1     testifying, whether a witness said something different at an  
2     earlier time, whether a witness' testimony sounded reasonable,  
3     and whether or to what extent a witness' testimony is  
4     consistent with other evidence that you believe. In deciding  
5     whether to believe a witness, remember that people sometimes  
6     hear or see things differently and sometimes forget things.  
7     You will have to decide whether a contradiction is an innocent  
8     misrecollection or a lapse of memory or an intentional  
9     falsehood, and that may depend on whether it has to do with an  
10    important fact or only a small detail.

11           You will have to decide whether certain facts have  
12    been proved by the greater weight of the evidence. It's also  
13    sometimes called the preponderance of the evidence. A fact  
14    has been proved by the greater weight or preponderance of the  
15    evidence if you find that it is more likely true than not  
16    true. You decide that by considering all of the evidence and  
17    deciding what evidence is more believable. You have probably  
18    heard the phrase "proof beyond a reasonable doubt." That is a  
19    stricter standard than "more likely true than not true." It  
20    applies in criminal cases but not in this civil case, so put  
21    it out of your mind.

22           Your verdict must be for the Plaintiff and against  
23    Defendants, the members of the Board of Police Commissioners,  
24    on the Plaintiff's race discrimination claim if all of the  
25    following elements have been proved. First, the members of



1 the Board of Police Commissioners did not transfer the  
2 Plaintiff to the position of Assistant Academy Director and,  
3 second, the Plaintiff's race was a motivating factor in the  
4 Defendants' decision. If either of the above elements has not  
5 been proved, your verdict must be for the Defendants and you  
6 need not proceed further in considering this claim. The  
7 members of the Board of Police Commissioners act only through  
8 their agents or employees, and any agent or employee of an  
9 organization may bind the organization by acts and statements  
10 made while acting within the scope of the authority delegated  
11 to the agent by the organization or within the scope of his or  
12 her duties as an employee of the organization.

13 Your verdict must be for the Plaintiff and against  
14 Defendant Daniel Isom on the Plaintiff's race discrimination  
15 claim if all the following elements have been proved. First,  
16 Defendant Daniel Isom did not -- I have a typo here. I  
17 apologize. I've got this written twice. So here's what it  
18 should say. Defendant Daniel Isom did not transfer the  
19 Plaintiff to the position of Assistant Academy Director.  
20 Thank you. And, second, the Plaintiff's race was a motivating  
21 factor in the Defendant's decision. If either of the above  
22 elements has not been proved, your verdict must be for the  
23 Defendants -- I'm sorry. We spent a long time doing this, but  
24 we also made more typos. This instruction just -- oh, let me  
25 see. Carol, would you come up, and I'm going to trade you

1 some instructions to correct my typos.

2 THE CLERK: Okay.

3 THE COURT: Come on over, and I'll do this. I made  
4 this same typo in several of these instructions, so I'm going  
5 to try to fix it, and I'm going to give you these three.

6 THE CLERK: 6, 7, and 8?

7 THE COURT: Uh-huh, 6, 7, and 8. Yeah, I've got it  
8 on all of them, so I'll trade you those.

9 Okay. We're going to try this again. So Instruction  
10 6, I'm going to read again and get these without my -- all the  
11 typos, and I apologize.

12 So Instruction 6 is: Your verdict must be for the  
13 Plaintiff and against Defendant Daniel Isom on the Plaintiff's  
14 race discrimination claim if all of the following elements  
15 have been proved. First, Defendant Daniel Isom did not  
16 transfer the Plaintiff to the position of Assistant Academy  
17 Director and, second, the Plaintiff's race was a motivating  
18 factor in the Defendant's decision. If either of the above  
19 elements has not been proved, your verdict must be for the  
20 Defendant and you need not proceed further in considering this  
21 claim.

22 Instruction 7: Your verdict must be for the  
23 Plaintiff and against Defendant Reggie Harris on the  
24 Plaintiff's race discrimination claim if all of the following  
25 elements have been proved. First, Defendant Reggie Harris did

1 not transfer the Plaintiff to the position of Assistant  
2 Academy Director and, second, the Plaintiff's race was a  
3 motivating factor in the Defendant's decision. If either of  
4 the above elements has not been proved, your verdict must be  
5 for the Defendant and you need not proceed further in  
6 considering this claim.

7 Your verdict must be for the Plaintiff and against  
8 Defendant Michael Muxo on the Plaintiff's race discrimination  
9 claim if all of the following elements have been proved.  
10 First, Defendant Michael Muxo did not transfer the Plaintiff  
11 to the position of Assistant Academy Director and, second, the  
12 Plaintiff's race was a motivating factor in the Defendant's  
13 decision. If either of the above elements has not been  
14 proved, your verdict must be for the Defendant and you need  
15 not proceed further in considering this claim.

16 Instruction 9: As used in these instructions, the  
17 Plaintiff's race was a motivating factor if the Plaintiff's  
18 race played a part in a Defendant's decision not to transfer  
19 the Plaintiff as the Assistant Academy Director; however, the  
20 Plaintiff's race need not have been the only reason for a  
21 Defendant's decision not to appoint or transfer the Plaintiff  
22 to the position.

23 If you find in favor of the Plaintiff under  
24 Instructions 5, 6, 7, or 8, then you must answer the following  
25 question in the verdict form. Has it been proved that the

1 Defendants would not have transferred Plaintiff to the  
2 position of Assistant Academy Director regardless of his race?

3 Instruction 11: Although there are several  
4 Defendants in this action, it does not follow from that fact  
5 alone that if one Defendant is liable to the Plaintiff all  
6 Defendants are liable. Each Defendant is entitled to a fair  
7 consideration of the evidence. No Defendant is to be  
8 prejudiced if you find against any of the others. Unless  
9 otherwise stated, all instructions I give you govern the case  
10 as to each Defendant.

11 Instruction 12: You may not return a verdict for the  
12 Plaintiff just because you might disagree with the Plaintiff's  
13 decision or believe it to be harsh or unreasonable.

14 Instruction 13: Your verdict must be for the  
15 Plaintiff and against Defendant Reggie Harris on the  
16 Plaintiff's claim of conspiracy if the following elements have  
17 been proved. First, the Defendant conspired with Defendant  
18 Michael Muxo to discriminate against Plaintiff by not  
19 transferring Plaintiff to the position of Assistant Academy  
20 Director because of his race and, second, that the Defendant  
21 or a coconspirator engaged in an overt act in furtherance of  
22 the conspiracy and, third, Plaintiff was thereby damaged. If  
23 any of the above elements has not been proved, your verdict  
24 must be for the Defendant on this claim.

25 Instruction 14: Your verdict must be for the

1 Plaintiff and against Defendant Michael Muxo on the  
2 Plaintiff's claim of conspiracy if the following elements have  
3 been proved. First, the Defendant conspired with Defendant  
4 Reggie Harris to discriminate against Plaintiff by not  
5 transferring Plaintiff to the position of Assistant Academy  
6 Director because of his race, second, that the Defendant or a  
7 coconspirator engaged in an overt act in furtherance of the  
8 conspiracy, and, third, Plaintiff was thereby damaged. If any  
9 of the above elements has not been proved, your verdict must  
10 be for the Defendant on this claim.

11 Instruction 15: If you find in favor of the  
12 Plaintiff under one or more of Instructions 5, 6, 7, 8, 13,  
13 and 14, then you must award the Plaintiff such sum as you find  
14 will fairly and justly compensate the Plaintiff for any  
15 damages you find the Plaintiff sustained as a direct result of  
16 the Defendants' actions.

17 In addition to the -- Instruction 16: In addition to  
18 the damages mentioned in the other instructions, the law  
19 permits the Jury under certain circumstances to award punitive  
20 damages. If you find in favor of the Plaintiff on any of his  
21 claims against Defendants Daniel Isom, Reggie Harris, or  
22 Michael Muxo, then you must decide whether the Defendant  
23 against whom you found acted with malice or reckless  
24 indifference to the Plaintiff's rights. A Defendant acted  
25 with malice or reckless indifference if the Defendant knew

1 that his actions were in violation of the law prohibiting race  
2 discrimination or acted with reckless disregard of that law.

3 If you find that the Defendants acted with malice or reckless  
4 indifference to the Plaintiff's rights, then in addition to  
5 any other damages to which you find the Plaintiff entitled  
6 against that Defendant, you may but are not required to award  
7 the Plaintiff an additional amount as punitive damages for the  
8 purposes of punishing a Defendant for engaging in such  
9 misconduct and deterring a Defendant and others from engaging  
10 in such misconduct in the future. You should presume that the  
11 Plaintiff has been made whole for his injuries by the damages  
12 awarded under these instructions.

13 If you decide to award punitive damages, you should  
14 consider the following in deciding the amount of punitive  
15 damages to award. One, how reprehensible the Defendant's  
16 conduct was. In this regard, you may consider whether there  
17 was deceit, intentional malice, and reckless disregard for  
18 Plaintiff's rights. Two, how much harm the Defendant's  
19 wrongful conduct caused the Plaintiff and could cause the  
20 Plaintiff in the future. Three, what amount of punitive  
21 damages in addition to the other damages already awarded is  
22 needed considering the Defendant's financial condition to  
23 punish the Defendant for his wrongful conduct toward the  
24 Plaintiff and to deter the Defendant and others from similar  
25 wrongful conduct in the future.

1           The amount of any punitive damages award should bear  
2 a reasonable relationship to the harm caused to the Plaintiff.  
3 You may assess punitive damages against any or all Defendants,  
4 or you may refuse to impose punitive damages. If punitive  
5 damages are assessed against more than one Defendant, the  
6 amounts assessed against such Defendants may be the same or  
7 they may be different.

8           So, at this time, we will have the closing arguments  
9 of the lawyers, and at the -- after that is concluded, then I  
10 will give you further instructions, and you will have the  
11 instructions as well as the exhibits that have been introduced  
12 as well as your notebooks with you in the jury room for your  
13 deliberations.

14           Ms. Petruska, you may proceed.

15           (See previously filed Excerpt of Closing Arguments,  
16 Document #105.)

17           THE COURT: All right. Now, members of the Jury, in  
18 conducting your deliberations and returning your verdicts,  
19 there's some rules you must follow, and I'll tell you those  
20 now. So, first, when you go to the jury room, you must select  
21 one of your members as your foreperson, and that person will  
22 preside over your discussions and speak for you here in court.  
23 Second, it's your duty as jurors to discuss this case with one  
24 another in the jury room. You should try to reach agreement  
25 if you can do so without violence to individual judgment

1 because a verdict must be unanimous. Each of you must make  
2 your own conscientious decision but only after you have  
3 considered all the evidence, discussed it fully with your  
4 fellow jurors, and listened to the views of your fellow  
5 jurors. Do not be afraid to change your opinions if the  
6 discussion persuades you that you should, but do not come to a  
7 decision simply because other jurors think it is right or  
8 simply to reach a verdict. Remember at all times that you are  
9 not partisans. You are judges, judges of the facts. Your  
10 sole interest is to seek the truth from the evidence in the  
11 case. Third, if you need to communicate with me during your  
12 deliberations, you may send me a note, signed by one or more  
13 jurors, by notifying the Court Security Officer who will be  
14 posted outside the door. Simply notify the Court Security  
15 Officer that you have a note, and the clerk will then come and  
16 get it, and I will respond as soon as possible either in  
17 writing or orally in open court. Remember you should not tell  
18 anyone, including me, how your votes stand numerically.  
19 Fourth, your verdict must be based solely on the evidence and  
20 on the law which I have given to you in my instructions. The  
21 verdict must be unanimous. Nothing I have said or done is  
22 intended to suggest what your verdict should be. That is  
23 entirely for you to decide. Finally, the verdict form is  
24 simply the written notice of the decision that you reach in  
25 this case.



1           We'll put it on; we'll show it to you now. It reads  
2 as follows. It's got the caption of the case. It says,  
3 "Verdict," and then there's a note that says, "Complete the  
4 following paragraphs by filling in the blanks as required by  
5 your verdict. Question or number one: On Plaintiff's claim  
6 of race discrimination, we find in favor of," and then there's  
7 a blank for Plaintiff David Bonenberger or Defendant St. Louis  
8 Board of Police Commissioners and then another line for the  
9 Plaintiff and each one of the individual Defendants, Michael  
10 Muxo, Reggie Harris, and Daniel Isom. "Number two: Answer  
11 this question only if one or more of your findings in  
12 paragraph one was in favor of Plaintiff. Has it been proved  
13 that the Defendants would not have transferred Plaintiff to  
14 the position of Assistant Academy Director regardless of his  
15 race?" You answer that one either "Yes" or "No". And then,  
16 "Number three: On Plaintiff's claim of conspiracy, we find in  
17 favor of," and there are two lines. The first, Plaintiff  
18 David Bonenberger or Defendant Michael Muxo, and the second,  
19 Plaintiff David Bonenberger or Defendant Reggie Harris. So,  
20 again, you fill those in with the name required from your  
21 verdict. Then there's another note, and it says, "Complete  
22 the following paragraphs only if you found for Plaintiff on  
23 one or more of the claims in paragraphs one or three -- and/or  
24 three." So then it says -- that says, "Four, we find  
25 Plaintiff's actual damages to be," and there's a line, and it

1 says, "stating the amount or if none, write 'none'." And then  
2 number five, there's another note. "Answer this question only  
3 if you have awarded actual damages in paragraph four. You may  
4 not award punitive damages against any Defendant unless you  
5 have first found against that Defendant and awarded Plaintiff  
6 actual damages. We assess punitive damages against Defendant  
7 Michael Muxo as," blank and then "stating the amount or if  
8 none, write the word 'none'. We assess punitive damages  
9 against Defendant Reggie L. Harris as," blank, "stating the  
10 amount or if none, write the word 'none'." And then, "We  
11 assess punitive damages against Defendant Daniel Isom as,"  
12 blank, "stating the amount or if none, write 'none'."

13 So you'll take this form with you to the jury room,  
14 and when each of you has unanimously agreed on the verdicts,  
15 your foreperson will fill in the form and sign and date it and  
16 advise the Court Security Officer that you're ready to return  
17 to the courtroom. As I said, you will have the written  
18 instructions as well as the verdict form. You can take your  
19 notebooks, and the exhibits will also be provided to you in  
20 the jury room.

21 (The Jury began deliberations at 11:52 a.m.)

22 (The following proceedings were held outside the hearing  
23 and presence of the Jury.)

24 THE COURT: All right. I'd like you all to remain in  
25 the courtroom until the clerk comes back, so she can know

1 where you are. We need you to be within no more than 10  
2 minutes away. We did order lunch for them. I don't know if  
3 it's -- when it will be coming, but, you know, so I mean I'm  
4 sure they won't decide in the next five minutes, and if there  
5 are any notes, I need you close so I can, you know, deal with  
6 any notes or questions. Okay?

7 MS. TUCKER: Okay.

8 THE COURT: All right. And so thank you very much.

9 (Court recessed from 11:53 a.m. until 1:58 p.m.)

10 (The following proceedings were held outside the hearing  
11 and presence of the Jury.)

12 THE COURT: Let's go on the record. Okay. On the  
13 record now. At about 1:45, we received a note from the Jury,  
14 and it says, "Judge Perry, number one, who pays damages and  
15 punitive damages -- individuals or the police department?  
16 Number two, is it permissible for the Jury to recommend that  
17 the EEOC be present for all interviews for transfers and  
18 promotions? Number three, please explain or reword question  
19 number two of the verdict sheets. We're not clear why that  
20 wasn't already answered in question number one." It says,  
21 "Thank you. Foreperson, Allen Loesel," and so I have proposed  
22 to the counsel that I provide the following answer in writing.  
23 "Members of the Jury, you must make your decision based on the  
24 evidence you have received and the instructions I gave you  
25 previously. I cannot answer the questions you ask. Please

1 review the instructions you have been given and follow those  
2 instructions." Signed, "Judge Perry." Is there any objection  
3 from either side to my sending in that answer in response to  
4 the question?

5 MS. PETRUSKA: On behalf of Plaintiff, no, Your  
6 Honor.

7 MS. TUCKER: On behalf of defense, no.

8 THE COURT: Okay. That's what we'll send in.

9 (Court recessed from 2:00 p.m. until 2:41 p.m.)

10 (The following proceedings were held outside the hearing  
11 and presence of the Jury.)

12 THE COURT: Okay. You can remain seated. Okay. So  
13 back on the record, after we answered the jury question,  
14 counsel continued to have some discussions about whether we  
15 had provided the verdict form in the correct format, and I  
16 came out and discussed it with both counsel informally off the  
17 record and, after some discussion, told them I thought the way  
18 we did it was correct and if they had anything specific they  
19 wanted to ask and put on the record to let me know, and so now  
20 I think the Plaintiffs do, so go right ahead.

21 MS. PETRUSKA: Right. My understanding was if we had  
22 a recommendation we should tell you.

23 THE COURT: Yeah. I mean anything you want to say  
24 because that was really just a -- it was an off-the-record  
25 discussion. Both sides were here, but if you think we've

1 screwed up these instructions and you think there's a way to  
2 fix it, please let me know.

3 MS. PETRUSKA: Judge, what we would propose after the  
4 second question on the verdict form is that the note be  
5 inserted that would say, "Complete the following paragraphs  
6 only if your preceding -- only if your answer to the preceding  
7 question is 'No'. If you answered 'Yes' to the preceding  
8 question, you should only consider Plaintiff's conspiracy  
9 claim further," although I'm not sure that that works either  
10 because of the combined form, but to make it -- to make it  
11 clear that their work is done on the discrimination claim in  
12 terms of damages if they don't find that the same decision  
13 would have been made if race was -- was really the only  
14 factor. So that -- so that they understand that they're done  
15 with that particular count if they -- if they don't find that  
16 but they can still consider the conspiracy count.

17 THE COURT: And why is it that we need to do that?

18 MS. PETRUSKA: The reason -- the only reason we're  
19 requesting it is because of the Jury's indication that there  
20 is some confusion as to the purpose or why question two is  
21 there and how it's different from question one, and I agree  
22 with you; it's a legal issue as to how and why it's different  
23 that goes to the issue of damages, but because of their  
24 confusion, I think we need to give them some more direction as  
25 to, you know, you're done with the conspiracy count if you

1 don't think the same decision would have been made only on the  
2 basis of race but you can still consider this conspiracy  
3 issue.

4 THE COURT: And what do the Defendants think?

5 MS. TUCKER: Your Honor, we take the position that  
6 the response to the Jury's question was appropriate.

7 THE COURT: Yeah. I'm going to stick with the  
8 response. I'm not going to change the instructions now. I do  
9 think that under *Desert Palace versus Costa* the reason we ask  
10 it in this way where we say, "Was race a motivating  
11 factor?" -- if they say, yes, race was a motivating factor and  
12 then we say, well, would they have made the same decision  
13 anyway, I mean, the example would be if they had -- you know,  
14 so they'd say -- the Jury could say based on this evidence --  
15 not that Defendant put on a lot of evidence about why they  
16 didn't want the Plaintiff for this job; they put on some  
17 evidence about why they liked the other person, but, you know,  
18 the Jury might think, well -- well, let me put this back.  
19 There would be support for an argument that, "Yeah, race was a  
20 motivating factor in the decision, but we wouldn't have given  
21 the job to the Plaintiff anyway. We would have hired somebody  
22 else. He wasn't going to get it anyway." That's the  
23 essential question in this case is --

24 MS. TUCKER: Sure.

25 THE COURT: -- is this Plaintiff damaged by this

1 action. That's why it's in this structure, and that's based  
2 on the *Desert Palace versus Costa* and the confusion that had  
3 arisen, as I understand it, between direct evidence and mixed  
4 motive cases and all of that, and this is how I think we've  
5 been directed to submit these.

6 If the Jury were to -- forget we had the conspiracy  
7 claim.

8 MS. TUCKER: Sure.

9 THE COURT: If the Jury were to find damages on this,  
10 it wouldn't make any difference because the -- it would be for  
11 naught because the Jury had already found that they wouldn't  
12 have given the Plaintiff this job anyway, and so even if they  
13 put damages in there, I could never enter a judgment giving  
14 the Plaintiff damages because the Jury had found that  
15 Defendants would not have transferred him to this position  
16 regardless of his race. So that, you know, you are concerned  
17 that they want to give him damages, but if they can't answer  
18 those questions in a way that under the law would give him  
19 damages, then it doesn't matter what they want. I admit that  
20 it is -- it is very confused because we're submitting this  
21 claim of conspiracy, and I -- you know, this whole issue of if  
22 they could be liable for conspiracy if they're not also liable  
23 for race discrimination is a good question. I'm not sure that  
24 that might -- perhaps, I should have not submitted that claim  
25 to the Jury, but I did, so -- so I think it's correct and my

1 explanation of it may not be perfect, but I believe this is  
2 the way. I don't think there's anything confusing about it  
3 other than the way these cases are normally confusing, and if  
4 they went back and looked at that instruction, it talks about  
5 motivating factor and it explains what that is, and someone  
6 could logically understand it. You know, "We would have made  
7 this same decision anyway even if race wasn't a factor."

8 MS. PETRUSKA: And our concern is the underlying  
9 question is confusing. I mean we've been talking about --

10 THE COURT: What's confusing about the underlying  
11 question, about would they have made the same decision?

12 MS. PETRUSKA: I -- and maybe it's because I'm very  
13 tired, but I keep looking at that, and I'm trying to figure  
14 out if I answer that "Yes" or "No" to say that it's the same  
15 decision, and we've talked about it because it's kind of  
16 really the double negative thing, and that's why we had tried  
17 to put it in the positive with respect to the same decision  
18 really being the Angela Taylor thing.

19 THE COURT: But that doesn't matter because Angela  
20 Taylor is not a party to this lawsuit. You know, whether she  
21 would have gotten the job regardless of her race is not a  
22 legal issue in this lawsuit because she's not a party to this  
23 lawsuit. The question is was the Plaintiff hurt by this  
24 decision, and if they would have made the same decision anyway  
25 and would not have given him this job, then it's the same



1 thing, so I -- so, anyhow, I'm sticking with the instructions  
2 and the verdict form the way they are, and I'm denying your  
3 request to change it at this point, and there are some  
4 negatives in there, but it can't be, "Would they have given it  
5 to Angela Taylor?" because what about Mr. Buckeridge? Maybe  
6 they would have given it to him. The Plaintiff still would  
7 not have been damaged at all, and so that wouldn't have had  
8 anything to do with this Plaintiff's race, and the question is  
9 was this Plaintiff denied this position because of his race.  
10 He's the one suing. That's the question.

11 MS. PETRUSKA: And, Judge, if the Model Instruction  
12 allowed us to ask it that way, I'd say that's clear.

13 THE COURT: So, okay, well, like I told you before,  
14 the models are just models, so. Okay. Well, we'll see what  
15 they do with it, and, you know, like I say, maybe we'll all  
16 have a lot of things to talk about.

17 MS. PETRUSKA: Thank you, Your Honor.

18 MS. BARTH: Thank you, Your Honor.

19 THE COURT: Court's in recess.

20 (Court recessed from 2:49 p.m. until 3:48 p.m.)

21 (The following proceedings were held outside the hearing  
22 and presence of the Jury.)

23 THE COURT: All right. I understand we have a  
24 verdict, and so I will ask the clerk to bring the Jury into  
25 the courtroom.

1 (The following proceedings were held within the hearing  
2 and presence of the Jury.)

3 THE COURT: All right. You may be seated.  
4 Mr. Loesel, I understand from your earlier note that you are  
5 the foreman, is that correct?

6 JUROR #6: Yes.

7 THE COURT: And I've been told the Jury has a  
8 verdict. Is that correct?

9 JUROR #6: Yes, Your Honor, we do.

10 THE COURT: All right. Would you hand your written  
11 verdict form to the clerk, and she'll bring it to me.

12 All right. I find that the verdict is in the proper  
13 format, and so I will ask the clerk to publish it by reading  
14 it aloud at this time.

15 THE CLERK: On Plaintiff's claim of race  
16 discrimination, we find in favor of Plaintiff David  
17 Bonenberger and --

18 THE COURT: Yeah, against --

19 THE CLERK: -- oh, I'm sorry -- against the Defendant  
20 St. Louis Board of Police Commissioners, for Plaintiff David  
21 Bonenberger and against Defendant Michael Muxo, for Plaintiff  
22 David Bonenberger and against Defendant Reggie L. Harris, for  
23 Plaintiff David Bonenberger against Defendant Daniel W. Isom.

24 On number two, has it been proved that the Defendants  
25 would not have transferred Plaintiff to the position of

1 Assistant Academy Director regardless of his race? Answer  
2 being no.

3 On number three, Plaintiff's claim of conspiracy, we  
4 find in favor of Plaintiff David Bonenberger and against  
5 Defendant Michael Muxo and in favor of Plaintiff David  
6 Bonenberger and against Defendant Reggie L. Harris. We find  
7 Plaintiff's actual damages to be \$200,000. We assess punitive  
8 damages against Defendant Michael Muxo as \$100,000. We assess  
9 punitive damages against Defendant Reggie L. Harris as  
10 \$300,000, and we assess punitive damages against Defendant  
11 Daniel Isom as \$20,000, and it's been signed by the  
12 foreperson, dated August 21st, 2013.

13 THE COURT: Mr. Foreperson, are these the true  
14 verdicts as have been read?

15 JUROR #6: Yes, they are.

16 THE COURT: Does either side wish to have the Jury  
17 polled individually?

18 MS. TUCKER: No, Your Honor.

19 THE COURT: Okay.

20 MS. PETRUSKA: No, Your Honor.

21 THE COURT: All right. Then as the verdict has been  
22 returned, I will accept it and will enter judgment in  
23 accordance with the Jury's verdict, and I now want to tell the  
24 Jury that you are excused in this case. I want to thank you  
25 for your service in the case. It's important you understand

1 I'm thanking you for your service, not for your verdict. I  
2 would say this no matter what your verdict had been. I know  
3 that this was not an easy case to decide where you had such  
4 stark contrast in the testimony, and I also know that some of  
5 it, you know, might have gotten a little tedious as you were  
6 listening to it, and you all paid a lot of attention, and we  
7 appreciate that, and I know that you worked hard to do your  
8 job according to the law and the evidence, and so thank you  
9 for that.

10 Now I want to tell you some things about your  
11 continuing rights and duties. You know that instruction I've  
12 been giving you that you can't talk about the case; you no  
13 longer have to -- you're not bound by that anymore. You can  
14 talk to anybody you want to about the case. You can say  
15 anything you want about the case. There's no limit on your  
16 First Amendment rights. We do have a rule in this court and  
17 it's enforced that none of the parties nor the lawyers or  
18 anybody associated with either side in the case can contact  
19 you and ask you anything about the case. That's not a limit  
20 on your First Amendment rights. If you want to talk to the  
21 lawyers, you're free to call them up on the phone. If you  
22 want to know who they are, you can call Carol tomorrow and  
23 she'll give you the names and phone numbers because lawyers  
24 always like to hear from jurors, but you don't have to do that  
25 at all.

1           Now, this is not a case that's received much  
2       publicity as far as I know; however, there is a chance you  
3       might be contacted by the press. Whether you respond to  
4       questions by the press -- and just so you know, we don't put  
5       your names out there, but they seem to have ways of finding  
6       out. Whether you get contacted by the press and whether you  
7       answer any questions is entirely up to you. You can say, "I'd  
8       rather not talk to you"; you can say, "I want to talk to you,"  
9       whatever you think. There are no limits, and so that's, you  
10      know, what you should know. You should know, though, nobody  
11      but me can ever make you talk about the case or your  
12      deliberations in the case, and although I have that power,  
13      I've only exercised it once in 23 years as a judge, so it's  
14      very rare. And so if anybody should try to say, "Oh, you have  
15      to answer my questions," you don't. The one thing about  
16      publicity -- and I don't think this is going to happen in this  
17      case, but when I see jurors on television and they start  
18      talking about what they did in the case, the only thing that  
19      bothers me is when one juror starts pointing the finger at  
20      another juror and says, "Oh, well, I was going to do this, but  
21      juror so-and-so, she wouldn't listen to reason or whatever."  
22      Then it seems like you're not respecting one another's  
23      privacy. That's just -- but that's, again, just my feeling.  
24      So think about if you're going to talk about what somebody  
25      else did in the jury room whether you -- you know, think about

1 their privacy interests, but you can answer questions or not  
2 answer questions.

3 If you want to ask me any questions, there are some  
4 questions I can answer and some I can't, but I would be glad  
5 to answer any questions if you have any, and I can meet you in  
6 the jury room to do that if you want to. You don't have to do  
7 that. You can just leave if you're ready to leave.

8 So with that said, I want to thank you for your  
9 service, and Carol will meet you in the jury room with your  
10 slips, and thank you again.

11 (The following proceedings were held outside the hearing  
12 and presence of the Jury.)

13 THE COURT: All right. Because of the request for  
14 equitable relief, we're not ready to actually enter a judgment  
15 yet since there is a request prayed for for equitable relief.  
16 I meant to ask you earlier how you wish to proceed on that.  
17 Do you know at this point if you wish to present any  
18 additional evidence or simply argument, in which case I'll  
19 schedule argument or have you brief it for another time?

20 MS. PETRUSKA: I assumed, Judge, you would probably  
21 have us brief it because -- I mean it was an intentional  
22 discrimination case, so I don't think there needs to be any  
23 additional evidence on that particular issue, but I assume  
24 that the Court might want some additional briefing on that  
25 because I don't think there's a lot of law around that issue.

1 I tried to give you what I could find.

2 THE COURT: Right. Part of it depends on what you're  
3 asking for.

4 MS. PETRUSKA: Right.

5 THE COURT: And so what I will do is -- how soon can  
6 you have a brief telling me what you're asking for and why you  
7 believe you're entitled to it, and then I'll give the  
8 Defendants a chance to respond. In terms of additional relief  
9 other than just the money judgment.

10 MS. PETRUSKA: Yes.

11 THE COURT: So do you need a week or 10 days or --

12 MS. PETRUSKA: Ten days, Judge.

13 THE COURT: Okay. So, yeah, how about -- well, I'm  
14 not entering the judgment.

15 MS. PETRUSKA: Right. That's what I was saying. She  
16 was asking, "Why didn't you ask for more time?" And I was  
17 thinking, oh, because I thought 30 days, and then I realized  
18 it didn't apply.

19 MS. BARTH: That's because she has another appeal  
20 due. That's all.

21 THE COURT: Okay. What about September 13th?

22 MS. PETRUSKA: That's fine, Your Honor.

23 THE COURT: Okay. And then how long does the  
24 Defendant want to have to file a response? Do you need --

25 MS. TUCKER: Same time.

1 THE COURT: Okay. So how about -- how about the  
2 27th? That's two weeks.

3 MS. TUCKER: 27th?

4 THE COURT: Yeah, September 27th.

5 MS. TUCKER: Yes.

6 THE COURT: Yes, September 27th.

7 MS. BARTH: September 27th?

8 THE COURT: Yeah. And if the Plaintiffs think a  
9 reply brief is in order, you'll have one week, October 4th.

10 MS. BARTH: October 4th.

11 THE COURT: Yeah. So September 13th for the motion,  
12 and call it a motion and file a memorandum, so a motion for  
13 whatever equitable relief you want. If you decide that all  
14 you want is a money judgment, that's easy, you can tell me  
15 that, and then we don't have to have any further briefing. I  
16 could just enter the money judgment in accordance with the  
17 Jury's verdict. But assuming you do want equitable relief of  
18 some sort, then you should say in the motion for equitable  
19 relief exactly what you want. If the equitable relief is  
20 something like some kind of instatement into a job or  
21 something like that and if the Defendant thinks that's  
22 something on which you would like to present evidence, then  
23 tell me that in your brief because I know in some cases -- and  
24 this is not a reinstatement case, but in some cases, we have  
25 heard evidence on whether reinstatement is practical. I'm



1 just thinking of analogies. It depends on what the Plaintiff  
2 asks for, and so I don't know. Maybe they'll just say the  
3 money judgment is all we want, but that's what we're going to  
4 do. That's the briefing schedule.

5 Please talk to the clerk about your exhibits, and  
6 I'll wait to hear from you. So no judgment will be entered  
7 until we clean up the equitable relief, so that then there  
8 will be one judgment that would wrap up everything. Okay.  
9 Any questions?

10 MS. PETRUSKA: Thank you, Your Honor.

11 THE COURT: All right. So court's in recess.

12 (Proceedings concluded at 4:00 p.m.)  
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CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 33 inclusive.

Dated at St. Louis, Missouri, this 8th day of September, 2014.

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/s/ Gayle D. Madden

GAYLE D. MADDEN, CSR, RDR, CRR

Official Court Reporter